Supreme Court, U. S.
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No. 79-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN SELLINGER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for writ of certiorari to review the judgment of the Appellate Court of Illinois insofar as petitioner's issue does not raise a question of constitutional proportion that is worthy of review.

OPINION BELOW

The opinion of the Appellate Court of Illinois is reported in *People* v. *Sellinger*, No. 78-2, unpublished pursuant to Illinois Supreme Court Rule 23 and has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari. It is, therefore, not contained in this Brief in Opposition. A petition for leave to appeal to the Illinois Supreme Court was denied on October 1, 1979, No. 52315.

JURISDICTION

The jurisdiction of this court is properly involved under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether a reviewing court can make its own determination as to the sufficiency of the evidence or the credibility of the witnesses where there is evidence to support a conviction.

2. Whether the conduct of the prosecutor during opening and closing argument warrants reversal of petitioner's conviction.

STATEMENT OF THE CASE

The pertinent facts in the instant case are stated in the opinion by the Illinois Appellate Court in *People* v. *Sellinger*, No. 78-2 submitted in the Petitioner's Appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

WHERE THERE IS EVIDENCE TO SUPPORT A CONVICTION, A REVIEWING COURT MUST NOT USURP THE FUNCTION OF THE JURY AND MAKE ITS OWN DETERMINATION AS TO THE SUFFICIENCY OF THE EVIDENCE OR THE CREDIBILITY OF THE WITNESSES.

Petitioner asks this Court to review a conviction that is well supported by evidence because, he claims, the evidence is contrary to human reason. He suggests that the Court remove the issue of credibility from the finder of fact and

makes its own determination as to credibility on review. The People of the State of Illinois maintain that petitioner's position flies in the face of well-settled case law and is not worthy of review by this Court.

The claim petitioner makes is similar to those that have been made before reviewing courts many times before and these courts have repeatedly rejected it. One example is *Johnson* v. *United States,* 426 F.2d 651 (D.C. Cir. 1970) where the appellant attacked the credibility of the witness for various inconsistencies in the testimony, arguing that it was not believable. The *Johnson* court refused to usurp the jury's function of evaluating credibility. "Of all the issues which are in the highest order for a jury one is hardpressed to suggest one more firmly intended and more plainly suited for jury determination than that of credibility." *Johnson,* 426 F.2d at 655

To protect the sanctity of this jury determination, this Court has provided that all evidence and inferences must be viewed in the light most favorable to the government as the prevailing party. *Glasser* v. *United States,* 315 U.S. 60 (1942) The reviewing court is then to determine whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence. *United States* v. *Alonzo,* 571 F.2d 1384 (5th Cir. 1978)

The evidence against the petitioner meets this test. The jury found petitioner guilty on the basis of sworn testimony of two police officers and on the direct evidence of tools discovered hidden in the locked trunk of the automobile used for crime. When this evidence is viewed favorably, as *Glasser* demands, it is convincing of guilt.

Petitioner, in his brief, expresses shock at the jury determination. However it is unavailing that a petitioner or even a reviewing court might disagree with the determination. Regardless of what a reviewing court might have resolved had it been the trier of fact, a jury verdict will not be overturned where there is evidence to support it. *Johnson,* supra, 426 F.2d at 655.

So too, the petitioner discounts evidence of one officer's testimony and of the direct evidence of the tools locked in the trunk, arguing that only circumstantial evidence, one officer's testimony, was in actuality relied on by the jury. However, even if this were to be true, evidence is not rendered insufficient because it happens to be largely circumstantial. *United States* v. *Cox,* 509 F.2d 390 (D.C. Cir. 1974)

In short, petitioner asks this Court to do what reviewing courts have refused to do time and again: invade the sanctity of the jury. He ignores settled law and suggests that *Thompson* v. *Louisville,* 362 U.S. 199 (1960) be extended to cover the facts in the case at bar. *Thompson* is, of course, inapplicable because it hinges upon a conviction wholly devoid of evidentiary support, a factor not present here. Petitioner's proposition is inimical not only to the case law cited above but to *Thompson* itself. *Thompson* was explicit: The decision "turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." *Thompson,* 362 U.S. at 199

Petitioner also points to the language in *United States* v. *Liguori,* 438 F.2d 663 (2d Cir. 1971) that warns that guilt cannot be based on "rationally insufficient" evidence. Although petitioner would have this Court believe that this is a purported extension of *Thompson,* the words "rationally insufficient" actually refer to a record that "discloses no proof whatever" and the words cite *Thompson* as authority. *Liguori,* 438 F.2d at 669 Petitioner lifts these words out of context and claims them to mean more than the *Liguori* court intended. Then he goes on to contend that the testimony of the officer in the case at bar becomes irrational because minor discrepancies were shown. His position attempts to change the entire idea and effect of simple impeachment, in disregard of actual case law.

Quite obviously, petitioner's claims is spurious. His petition before this Court should be denied.

II.

PETITIONER PRESENTS NO EVIDENCE OF IMPROPRIETY BY THE PROSECUTOR DURING OPENING AND CLOSING ARGUMENT REQUIRING REVERSAL.

Petitioner claims that the prosecutor tried to show that petitioner was a "bad man" by means of a carefully conceived strategy of injecting prejudice into the trial. The People maintain that there was no such plot and that the prosecutor's conduct was well within the bounds of due process of law.

Specifically, petitioner points to the prosecutor's opening argument, arguing that the prosecutor informed the jury he referred to a hypodermic needle found in the area near the arrest and explained that a police officer recognized petitioner when he passed him in the street. The objection to these references, petitioner insists, is that only one inference can be drawn from them: petitioner was a known junkie compelled to commit burglary to support his addiction. Petitioner asks that this Court treat these remarks as an improper maneuver by the prosecutor to present evidence of prior crimes.

Petitioner also points to the prosecutor's closing argument and complains that counsel called the automobile stop a felony stop when it was actually for improper lane usage. Taken all together, these references, according to petitioner, demonstrate a plot to portray petitioner as a "bad man."

In spite of petitioner's inventive posture, there was no scheme or impropriety. The prosecutor began his opening statement with the comment that these opening remarks were not evidence. (R. 334-335) He explained that an investigator would testify he recognized the petitioner on the

street. Later, just as the prosecutor promised, the investigator took the stand and testified to that very occurrence. Moreover the investigator didn't explain the nature of his acquaintance with petitioner and there is no reason to conclude that the basis of their contact could only have been criminal in nature.

Nor was reference to the hypodermic needle improper. Mention of it was understandable since it had been listed in discovery. (R. 342) Evidence of the needle was not introduced, however, because the judge ruled it inadmissible after opening statement. But the prosecutor could not have foreseen that at the time he made his remark. This situation is similar to that in *Spindler* v. *United States,* 336 F.2d 678 (9th Cir. 1964) where the prosecutor revealed at opening argument that he expected to prove a certain threat had been made but was later prevented from offering proof of that threat when the judge held the evidence inadmissible. The *Spindler* court did not find the remark improper nor prejudicial to the case against the defendant. The People maintain that the same holding is applicable to the case at bar.

Finally, the prosecutor's remark at closing argument did not prejudice petitioner's case. Petitioner's explanation that this remark was part of a deliberate attempt to poison the jury's minds is not convincing. Instead, it is reasonable that the prosecutor merely used imprecise language since, although he referred to it as a felony stop, the prosecutor appears to have meant that a felony charge ultimately resulted after the car was stopped.

If a court could construe any error at all, it could be only harmless error. Petitioner cites to the tests for harmless error fashioned by this Court in *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) and *Chapman* v. *California,* 386 U.S. 18 (1967). He takes issue with the Appellate Courts determination that these tests were satisfied in light of the substantial evidence:

the direct evidence of tools in the trunk and the sworn testimony of two police officers. The insubstantial evidence together with the pervasive scheme to prejudice the petitioner, he asserts, amount to a due process violation. But as the People have shown, the instances petitioner points to are not inflammatory; they are innocuous. The trial record is nearly 900 pages and yet petitioner can point to only these three insignificant and isolated instances as evidence of his fabricated plot.

The case law petitioner cites is as off-base as his interpretation of the facts. He cites cases involving the inadmissibility of prior crimes, *Michelson* v. *United States,* 335 U.S. 464 (1948); *Hall* v. *United States,* 150 U.S. 76 (1893); prior arrests, *Government of Virgin Islands* v. *Oliver,* 360 F.2d (3d Cir. 1966); mug shots, *Barnes* v. *United States,* 365 F.2d 509 (D.C. Cir. 1966), *United States* v. *Harrington,* 490 F.2d 487 (2d Cir. 1973); and compelling a defendant to appear before a jury in prison clothes, *Gaito* v. *Brierly,* 485 F.20 86 (3d Cir. 1973).

The facts in the case at bar are, instead, in line with cases involving improper statements in opening or closing argument. One example is *United States* v. *Lefner,* 422 F.2d 1021 (9th Cir. 1970) where the *Lefner* defendant, much like the petitioner at bar, made claims that the prosecutor made several statements that are calculated to mislead the jury. That court concluded that while such statements may be error, they did not constitute reversible error. The People submit that reversible error is absent from the case at bar as well.

Although petitioner complains that the Appellate Court did not use the *Fahy* and *Chapman,* supra, tests for finding lack of error, the facts demonstrate that the Court's decision is well within the bounds of those cases. Petitioner has not shown any evidence of a scheme to prejudice the jury by the prosecution. There is no need for this Court to once again reiterate the harmless error rule. The petitioner should be denied and the conviction should stand.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully ask that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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